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BEFORE THE
SURFACE TRANSPORTATION BOARD

INDIANA SOUTHWESTERN RAILWAY CO. -- ABANDONMENT EXEMPTION -- IN POSEY AND VANDERBURGH COUNTIES, IN	))))	DOCKET NO. AB-1065X

REPLY TO SUPPLEMENT TO APPEAL

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DATE FILED: March 7, 2011

BEFORE THE
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INDIANA SOUTHWESTERN RAILWAY CO. -- ABANDONMENT EXEMPTION -- IN POSEY AND VANDERBURGH COUNTIES, IN	))))	DOCKET NO. AB-1065X

REPLY TO SUPPLEMENT TO APPEAL

Pursuant to 49 C.F.R. § 1152.25(e)(1)(i) and 49 C.F.R. § 1011.2(a)(7), the TOWN OF POSEYVILLE, INDIANA ("the Town") hereby replies in opposition to a Supplement to Appeal ("Supp.") filed by Indiana Southwestern Railway Co. ("ISW") on February 25, 2011.

Reply to Background (Supp. at 3-5)

Numerous misleading statements in the Background section of the Supplement require clarification. The Town did not "refuse to answer" the discovery submitted by ISW (Supp. at 3). The Town took the position that discovery is not permitted in OFA proceedings. When the Board disagreed with that position in part, the Town answered the discovery.

Although the Town has stated that it does not have sufficient discretionary funds to purchase the line (Supp. at 4), the Town has cash and investments that exceed the amount that it offered for purchase of the line (Response to Request No. 1; cash and investments on hand in the amount of $1,088,494.40 vis-a-vis purchase price offered of $376,600).

Although the Town does not have committed resources from which it can fund a purchase of the line (Supp. at 4), the Town has identified County and State agencies which are shown to be likely sources of grant funds for the purchase (Response to Request No. 2).

Although the Town has not begun a grant application process (Supp. at 4), it would be premature to do so before the purchase price has been established through the OFA process

(Response to Request No. 2). The 90-day period for closing a purchase following establishment of the purchase price is provided to permit entities to obtain funding for the purchase.

Contrary to ISW's implication that the Town has withheld details regarding inquiries from third parties concerning funds for purchase of the line (Supp. at 5), the Town's Response to Request No. 7 makes it clear that the Town would be required to issue a Request for Proposals (RFP) in order for a third party to participate in funding a purchase of the line, and no such RFP has been issued.

There is no basis for any implication that the Town plans to salvage the line in the future (Supp. at 5), as evidenced by the Town's response of "not applicable" to Request No. 23.

It is highly misleading for ISW to contend that the Town "has no plans for future operation of the Lines" (Supp. at 5). While the Town truthfully responded that it "has not developed a formal plan for operation" (Response to Request No. 30), it does not at all follow that the Town does not intend to arrange for operation of the line.

There is no basis for ISW's implication that the Town may have been "in contact with salvage companies" (Supp. at 5). The Town's response to Request No. 23 makes it clear that the Town does not intend to salvage the line.

Reply to Standard of Review (Supp. at 6-7)

The Town acknowledges that it was mistaken in contending that 49 C.F.R. § 1011.6(b) contains the applicable standard of review (Reply to Appeal, filed on January 13, 2011 at 3). The Town agrees that the applicable standard of review is that contained in 49 C.F.R. § 1152.25(e)(2)(ii), i.e., whether or not "the action would be affected materially because of new evidence, changed circumstances, or material error" (Supp. at 5).

Reply to Standard for Accepting or Rejecting an OFA (Supp. at 7-9)

ISW has not correctly stated the standards for accepting or rejecting an OFA. The standards are set forth in 49 C.F.R. § 1152.27(c)(1)(ii), made applicable as to exemption proceedings by 49 C.F.R. § 1152.27(c)(2)(iii), viz.:

Contents of Offer. The offeror shall set forth its offer in detail. The offer must:

(A) Identify the line, or portion of the line, in question;

(B) Demonstrate that the offeror is financially responsible; that is, that it has or within a reasonable time will have the financial resources to fulfill proposed contractual obligations; government entities will be presumed to be financially responsible;

(C) Explain the disparity between the offeror's purchase price or subsidy if it is less than the carrier's estimate under paragraph (a)(1) of this section, and explain how the offer of subsidy or purchase is calculated.

Proof that an OFA is for continued rail freight service is not a requirement of the Board's regulations. However, if that subject matter is disputed, it is the Board's practice to determine whether or not an OFA is filed in good faith for that purpose. *See Borough of Columbia v. STB*, 342 F.3d 222, 230-231 (3rd Cir. 2003).

An offeror has the burden of proof as to the three requirements of an OFA set out in 49 C.F.R. § 1152.27(c)(1)(ii), except that because of the presumption, an opponent of an OFA has the burden to prove that a government entity is not financially responsible. An opponent of an OFA also has the burden to prove that an OFA is not for continued rail freight service if it disputes that issue.

In the present case, the OFA filed by the Town satisfied the Town's burden of proof under 49 C.F.R. § 1152.27(c)(1)(ii) inasmuch as the OFA clearly identified the line in question, identified the Town as a government entity whose financial responsibility is presumed, and explained the disparity between the amount offered for purchase of the line and ISW's asking price.

That being the case, ISW now has the burden to prove that (1) the Town is not financially responsible, that is, that the Town does not have, and within a reasonable time will not have, the financial resources to purchase the line; or (2) that the OFA is not for continued rail freight service. ISW's Supplement wrongly attempts to imply that the Town has the burden to prove the affirmative of those issues, but it is beyond dispute that the burden of proof lies squarely on ISW.

As demonstrated below, ISW has not sustained that burden, requiring denial of its appeal.

ARGUMENT

I. ISW HAS NOT SHOWN THAT THE TOWN DOES NOT HAVE, AND WITHIN A REASONABLE TIME WILL NOT HAVE, THE FINANCIAL RESOURCES TO PURCHASE THE LINE (Supp. 9-12)

ISW has not sustained its burden to prove that the Town does not have, and within a reasonable time will not have, the financial resources to purchase the line. On the contrary, the evidence adduced in discovery tends to establish the opposite.

Thus, the Town's most recent financial statement shows that the Town has cash and investments on hand in an amount that is nearly three times the amount of the purchase price that it has offered (Response to Request No. 1, attachment, page 2, "total cash and investments December 31, 2009). Cash and investments on hand on December 31, 2009 total $1,088,494.40. The Town has offered to purchase the line for $376,600. While the Town's Statement of Receipts, Disbursements, Cash, and Investment Balances as of December 31, 2010 is not yet available, there have been no significant variances in revenues and expenses for 2009 and 2010 (Response to Request No. 1). The Town has been able to accumulate that amount of cash and investments because it derives substantial revenues from the provision of gas, sewer, and water utilities (*id.*, attachment, pp. 1-2).

That evidence would enable the Board to find that the Town currently has the financial resources to purchase the line. The Town candidly acknowledged that it did not intend to use the funds in its cash and investment account for purchase of the line (Response to Request No. 2). Nevertheless, the amount in that account would be more than sufficient for purchase of the line at the amount offered by the Town.

In any event, ISW has not proven that within a reasonable time, the Town will not have the financial resources to purchase the line. On the contrary, the Town has identified, as likely sources of grant funds for purchase of the line, the Posey County Economic Development Partnership, the Economic Development Coalition of Southwest Indiana, the Indiana Economic Development Corporation, and the Industrial Rail Service Fund (IRSF) of the Indiana Department

of Transportation (Response to Request No. 2). There is evidence to support the likelihood of the Town obtaining such grants inasmuch as ISW itself has obtained $411,000 in IRSF grant funds over the past 10 years, and other communities in Indiana have preserved rail service in a similar manner (*id.*).

ISW nonetheless contends that the Town was required to prove that it has obtained sufficient grant funds for the purchase, or that it has formally applied for such funds (Supp. at 11-12). That is to say that ISW contends that a "reasonable time" for obtaining funding within the meaning of the applicable regulation is at the time of the filing of an OFA.

That cannot be the law. At the time of filing an OFA, the purchase price of the line has not been established through the OFA process. If, at the time of filing an OFA, an offeror obtained funds in the amount that it has offered as a purchase price, or applied for funding in that amount, and the Board subsequently established the purchase price at an amount in excess of the amount offered, it would be necessary for the offeror to obtain additional funds, or to apply for additional funding, at the time that the purchase price was established. Under the Board's OFA procedures, ninety days from that time are allowed for that purpose before closing. Thus, a "reasonable time" for obtaining funding under the applicable regulation is during the period between establishment of the purchase price and closing of the purchase. The evidence in the present case shows the likelihood of such funding at that reasonable time, i.e.; that grant funds are available and would be applied for "once the purchase price has been established through the OFA process" (Response to Request No. 2). Thus, the regulation at 49 C.F.R. § 1152.27(c)(1)(ii)(B) is satisfied if there is a showing that it is likely that an offeror will be able to obtain funding by the time of closing of the purchase.

Based on all of the foregoing, the Board should find that ISW has failed to sustain its burden of proof that the Town does not, and within a reasonable time will not, have the financial resources to purchase the line.

II. ISW HAS NOT SHOWN THAT THE OFA IS NOT FOR CONTINUED RAIL FREIGHT SERVICE (Supp. at 12-13)

ISW has not sustained its burden to prove that the OFA is not for continued rail freight service. ISW has argued that the Town's failure to have shown a public need for rail freight service on the line proves that the OFA is not for continued rail freight service (Supp. at 11-13). In particular, ISW contends that a finding that the OFA is not for continued rail freight service is warranted by the absence of any shippers on the line, the Town's failure to have identified a source of future rail freight traffic on the line, and the Town's failure to have developed a formal plan for operation of the line (*id.*).

The most definitive recent court decision on the issue refutes ISW's argument. Thus, in *Borough of Columbia v. STB*, 342 F.3d 222 (3rd Cir. 2003), the Court said (at 233):

> . . . STB precedent does not require the sort of demonstration that the petitioners would have the agency require -- 'rail plans', a 'time table to reactivate service,' 'means to finance restoration of crossings and rehabilitation of the embargoed track,' 'economic forecasts,' 'guarantees of service,' 'contracts with shippers,' 'showing of railroad management experience or skills,' 'rail equipment,' 'personnel to operate the equipment,' and 'projections of rail traffic' that are deemed 'reasonable' . . . we find persuasive the STB's characterization of its own precedent, as stated in the decision challenged by the instant petition for review:
>
> > '*Roaring Fork* does not set out a rigid test requirement for an offeror to demonstrate that the line would be viable. It merely requires a sufficient showing to support a finding that an offer is, indeed, for continued rail freight service and not for some other purpose . . . (A) party filing an OFA does not need to prove in advance that its efforts to revive a failing line will without question succeed.' (*1411 Corp. -- Aband. Exempt. -- in Lancaster County, PA*, 2001 STB LEXIS 712 at *3, emphasis added, Docket No. AB-581X, decision served September 6, 2001).

There is absolutely no evidence that the Town is acquiring the line "for some other purpose" instead of for continued rail freight service. Thus, nothing in the record would support a finding that the Town is acquiring the line to thwart trail use of the right-of-way, or to further its utility operations, or for any other nonrail use. On the contrary, the record shows that the Town intends to acquire the line with grant funds that contemplate continuation of rail freight service (Response to Request No. 2); that after acquiring the line, the Town will contract with an

experienced rail operator to provide rail freight service on the line (Letter from the Town to the Board, dated January 24, 2011); and that the Town has not solicited proposals for track salvage (Response to Request No. 31).

In sum, the Town's interest is to preserve the line for the provision of rail freight service as soon as possible, and thereby to further economic development in and around Poseyville and Posey County. Quite simply, the Town is of the opinion that it can do a better job of attracting freight shippers to the line, compared to ISW's failure to have done so in recent years.

In that respect, the present case is much like *Illinois Central R.R. Co. -- Aband. Exempt. -- in Perry County, IL*, 1994 ICC LEXIS 292 (Docket No. AB-43 [Sub-No. 164X], decision served November 8, 1994) (*Perry County*), which was cited with favor in *Borough of Columbia v. STB, supra*, (342 F.3d at 234). In *Perry County*, a coal company filed an OFA to subsidize a line that had been authorized for abandonment due to low demand for coal and expiration of long-term coal supply contracts. The coal company owned an inactive coal mine at the end of the line. The coal company wanted to preserve the opportunity for rail freight service pending the return of favorable coal marketing conditions. The rail carrier, in opposing the OFA, argued that the line had been inactive for three years, and that there was no tangible prospect for rail freight service in the future. In finding that the OFA was for continued rail freight service, the ICC stated that its role is to preserve the potential for rail transportation, and that the coal company was offering to subsidize the line with a view to secure it for rail purposes in order to tender coal for rail transportation as soon as it had coal to offer (1994 ICC LEXIS 292 at *7).

For all of the foregoing reasons, the Board should find that ISW has failed to sustain its burden to prove that the Town's OFA is not for continued rail freight service.

CONCLUSION AND REQUESTED RELIEF

Based on the foregoing, the Town respectfully requests that ISW's appeal should be denied.

Denial of the appeal would permit the OFA process to go forward. The Town is confident of its ability to fund the purchase at closing. But assuming, solely for the sake of argument, that

such funding were not to be available, abandonment of the line would then be reinstated, albeit on a delayed basis. Any such delay would not be unfair to ISW. The potential for such delay was part of the legislative compromise in the Staggers Act whereby the abandonment process was greatly accelerated in exchange for required compliance with the OFA provisions. *See* H.R. Rep. 96-1430, *Report of the Committee on Conference on S. 1946*, 96th Cong., 2d Sess., September 29, 1980, at 125.

Ironically, that is illustrated in a decision cited in ISW's Supplement at 11, i.e., *Consolidated Rail Corp. -- Aband. -- between Corry and Meadville in Erie and Crawford Counties, PA*, 1995 ICC LEXIS 264 (Docket No. AB-167 [Sub-No. 1139], decision served October 5, 1995). In that case, as in the present case, the rail carrier expressed concern that the government entity would not have the ability to fund purchase of the line at closing. In order to alleviate that concern, the rail carrier argued that funds sufficient to pay the purchase price should be escrowed until closing. In refusing to impose the requested escrow, the ICC said (at *22-23):

> . . . That argument lacks merit. Penn DOT and the Authority have demonstrated that funding is available for the $2.9 million purchase and that the Authority is prepared to proceed to a closing (footnote omitted). If, in fact, it is unable to close, that will render this whole proceeding moot. If, on the other hand, the Authority produces the $2.9 million purchase price, as we anticipate it will, that will render Conrail's request for escrow moot.

Respectfully submitted,

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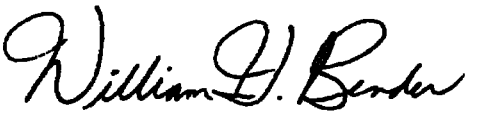

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DATE FILED: March 7, 2011

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2011, I served the foregoing document, Reply To Supplement To Appeal, by electronic mail, on the attorneys for Indiana Southwestern Railway Co., William A. Mullins and Robert A. Wimbish, Baker & Miller, 2401 Pennsylvania Avenue, Suite 300, Washington, DC 20037, and on Ms. Venetta Keefe, Senior Rail Planner, Indiana Department of Transportation, 100 North Senate Avenue, Room N955, Indianapolis, IN 46204.

William H. Bender